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In the Supreme Court of the United States

OCTOBER TERM, 1957

JAMES J. MATLES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The opinion of the Court of Appeals (R. 183–195; Pet. App. B, 20–32) is not yet reported. The opinion of the District Court (R. 123–127) is not reported.

JURISDICTION

The judgment of the Court of Appeals was entered on June 10, 1957 (R. 196), and a petition for rehearing was denied on July 5, 1957 (R. 203). On July 9, 1957, Mr. Justice Harlan extended the time for filing a petition for a writ of certiorari to and including August 20, 1957, and the petition was filed on August 16, 1957. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether the defendant in a proceeding to set aside an order of naturalization, who had been ordered to testify upon deposition pursuant to Rule 26 of the Federal Rules of Civil Procedure, could properly be held in contempt for his refusal to be sworn before any questions were asked.

2. Whether the denaturalization proceeding was invalidated by the absence of an affidavit of good cause accompanying the original complaint when an amended complaint accompanied by such affidavit has been filed pursuant to the stipulation of defendant that the amended complaint "is and shall be deemed to be substituted for the original complaint".

3. Whether the refusal to be sworn could be defended on the ground that the affidavit showing good cause was insufficient where that contention had been overruled on a motion to dismiss the complaint.

STATUTES AND RULES INVOLVED

The Act of October 16, 1918 (40 Stat. 1012, as amended, 8 U. S. C. (1934 ed.) 137):

> SECTION 1. That the following aliens shall be excluded from admission into the United States:
>
> * * * * *
>
> (e) Aliens who believe in, advise, advocate, or teach, or who are members of or affiliated with any organization, association, society, or group, that believes in, advises, advocates, or teaches: (1) the overthrow by force or violence of the Government of the United States or of all forms of law, * * *

(d) Aliens who write, publish, or cause to be written or published, or who knowingly circulate, distribute, print, or display, or knowingly cause to be circulated, distributed, printed, published, or displayed, or who knowingly have in their possession for the purpose of circulation, distribution, publication, or display, any written or printed matter, advising, advocating, or teaching, opposition to all organized government, or advising, advocating or teaching: (1) the overthrow by force or violence of the Government of the United States or of all forms of law, * * *.

The Nationality Act of 1940, Section 338 (a) (54 Stat. 1158, 8 U. S. C. (1940 ed.) 738 (a)) provided:

It shall be the duty of the United States district attorneys for the respective districts, upon affidavit showing good cause therefor, to institute proceedings in any court specified in subsection (a) of section 301 in the judicial district in which the naturalized citizen may reside at the time of bringing suit, for the purpose of revoking and setting aside the order admitting such person to citizenship and canceling the certificate of naturalization on the ground of fraud or on the ground that such order and certificate of naturalization were illegally procured.

Federal Rules of Civil Procedure:

Rule 15.—*Amended and Supplemental Pleadings*

(a) *Amendments.*

A party may amend his pleading once as a matter of course at any time before a responsive pleading is served * * *.

* * * * *

(c) *Relation back of amendments.*

Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading.

Rule 26.—*Depositions Pending Action*

(a) *When depositions may be taken.*

Any party may take the testimony of any person, including a party, by deposition upon oral examination or written interrogatories for the purpose of discovery or for use as evidence in the action or for both purposes. * * *.

(b) *Scope of examination.*

Unless otherwise ordered by the court as provided by Rule 30 (b) or (d), the deponent may be examined regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the examining party or to the claim or defense of any other party. * * *.

* * * * *

(d) *Use of depositions.*

* * * * *

(2). The deposition of a party or of any one who at the time of taking the deposition was an officer, director, or managing agent of a public or private corporation, partnership, or association which is a party may be used by an adverse party for any purpose.

* * * * *

STATEMENT

Petitioner seeks review of the judgment of the Court of Appeals for the Second Circuit (R. 196) affirming the judgment of the District Court for the Eastern District of New York, by which petitioner was held in contempt for refusal to be sworn for the taking of his oral deposition, after being so directed by the court (R. 121). Sentence of three months' imprisonment was imposed (R. 122).

The record may be summarized as follows: The government instituted proceedings for setting aside of the order and certificate of naturalization of petitioner, alleging fraud in his petition for naturalization dated August 2, 1934, by reason of his active membership in the Communist Party from 1929 to 1952, and alleging illegality by reason of his not being of good moral character and not being attached to the principles of the Constitution (R. 44–54).

The original complaint, filed on December 16, 1952 (R. 38–43, 67), was challenged by petitioner on the basis that it was not accompanied by an affidavit showing good cause (R. 57). By stipulation between petitioner and the government on September 15, 1953, it was agreed that an amended complaint, which was accompanied by affidavit, be substituted for the original complaint, and that petitioner's motion to dismiss of May 15, 1953, and the memoranda of opposing counsel, apply to the amended complaint (R. 55).

The affidavit accompanying the amended complaint was by an attorney of the Immigration and Naturalization Service to the effect that, from the official rec-

ords of the Service, it appeared that petitioner's allegations under oath in the naturalization proceeding—that he did not belong to an organization advocating the overthrow of the government, was attached to the principles of the Constitution of the United States, and renounced all allegiance to a foreign sovereign—were false in that petitioner was an active member of the Communist Party from 1929 to 1952; that he and the Communist Party at all times advocated the overthrow of the government; and that petitioner bore allegiance to the Soviet Union. The affidavit also alleged that petitioner intentionally made the false statements to prevent full investigation of his qualifications for citizenship (R. 50–54).

Petitioner's motion to dismiss the complaint was denied on November 13, 1953 (R. 59), but trial was delayed pending determination of the question of the necessity for an affidavit in *United States* v. *Zucca*, 351 U. S. 91, decided April 30, 1956.[1] On July 10, 1956, the government served notice on petitioner of the taking of his deposition pursuant to Rule 26, F. R. Civ. P. After various adjournments, petitioner appeared on October 15, 1956, but refused to be sworn (R. 22, 26). He persisted in his refusal on October 22, 1956, when directed by the district judge to be sworn (R. 27, 30). An order to show cause why petitioner should not be punished for contempt was issued (R. 118), and upon the hearing thereof petitioner was found to be in contempt and sentenced to three

[1] Petitioner had urged, as he does in this Court, that the action had not been properly instituted, and that the affidavit was insufficient.

months' imprisonment (R. 121–122). Upon appeal, the judgment was affirmed (R. 196).

ARGUMENT

1. Petitioner contends that the proceeding to cancel his naturalization certificate for illegality and fraud is a criminal case and that, like the defendant in a criminal case, he was entitled not only to the privilege against answering incriminating questions, but to an absolute right to refuse to be sworn for any questions whatsoever (Pet. 10–13). The attempted analogy to a criminal case has been long and repeatedly rejected by this Court. This action is, not merely in form, but in substance, an equity action to cancel a grant obtained illegally or through fraud. Whatever criminal aspects may be involved in obtaining naturalization are separately dealt with by criminal statutes such as 18 U. S. C. 1015. The proceedings to cancel are, as this Court has time and again noted, civil in character. In *Johannessen* v. *United States*, 225 U. S. 227, 242–243, the Court said:

> * * * The act imposes no punishment upon an alien who has previously procured a certificate of citizenship by fraud or other illegal conduct. It simply deprives him of his ill-gotten privileges. We do not question that an act of legislation having the effect to deprive a citizen of his right to vote because of something in his past conduct which was not an offense at the time it was committed would be void as an *ex post facto* law. *Cummings* v. *Missouri*, 4 Wall. 277, 321; *Ex parte Garland*, 4 Wall. 333, 378. But the act under consideration inflicts

> no such punishment, nor any punishment, upon a lawful citizen. It merely provides that, on good cause shown, the question whether one who claims the privileges of citizenship under the certificate of a court has procured that certificate through fraud or other illegal contrivance, shall be examined and determined in orderly judicial proceedings. The act makes nothing fraudulent or unlawful that was honest and lawful when it was done. It imposes no new penalty upon the wrongdoer. But if, after fair hearing, it is judicially determined that by wrongful conduct he has obtained a title to citizenship, the act provides that he shall be deprived of a privilege that was never rightfully his. * * *

In *Luria* v. *United States*, 231 U. S. 9, 27, the Court said:

> The right asserted and the remedy sought were essentially equitable, not legal, and this, according to the prescribed tests, made it a suit in equity. * * * In this respect it does not differ from a suit to cancel a patent for public land or letters patent for an invention.

See also the statement in *Schneiderman* v. *United States*, 320 U. S. 118, 160, which laid down the test of clear and convincing evidence, that "[a] denaturalization suit is not a criminal proceeding", and in *Yates* v. *United States*, 354 U. S. 298, 335, characterizing prior proceedings to set aside Schneiderman's naturalization as "civil in character". And compare the long line of decisions by this Court that deportation proceedings, however dire the conse-

quences, cannot be considered criminal.[2] Thus, in *Bilokumsky* v. *Tod*, 263 U. S. 149, 155, the Court specifically ruled that the defendant in deportation proceedings could be required to testify. And this Court in *Galvan* v. *Press*, 347 U. S. 522, 531, clearly summarized the matter, in rejecting an argument that "the intrinsic consequences of deportation are so close to punishment for crime, it might fairly be said also that the *ex post facto* Clause, even though applicable only to punitive legislation, should be applied to deportation." The Court stated:

> But the slate is not clean. As to the extent of the power of Congress under review, there

[2] *Fong Yue Ting* v. *United States*, 149 U. S. 698, 730: "The proceeding before a United States judge * * * is in no sense a trial and sentence for a crime or offence. It is simply the ascertainment, by appropriate and lawful means, of the fact whether the conditions exist upon which Congress has enacted that an alien of this class may remain within the country. The order of deportation is not a punishment for crime." *Lees* v. *United States*, 150 U. S. 476, 480 (distinguishing the "penalty" of the $1,000 fine upon an importer of contract labor from the deportation of the laborer). *Bugajewitz* v. *Adams*, 228 U. S. 585, 591 (discussing termination of alien's right to remain in United States because of prostitution: "The determination by facts that might constitute a crime under local law is not a conviction of crime, nor is the deportation a punishment: * * *.") *Mahler* v. *Eby*, 264 U. S. 32, 39 (distinguishing deportation from "criminal laws" and from "punishment"). *Jordan* v. *De George*, 341 U. S. 223, 230 (requiring freedom from vagueness in statute for deportation of aliens, while observing that "this statute does not declare certain conduct to be criminal. Its function is to apprise aliens of the consequences which follow after conviction and sentence of the requisite two crimes"). *Harisiades* v. *Shaughnessy*, 342 U. S. 580, 594–595: "Deportation, however severe its consequences, has been consistently classified as a civil rather than a criminal procedure".

> is not merely "a page of history," *New York Trust Co.* v. *Eisner*, 256 U. S. 345, 349, but a whole volume. * * * [W]hatever might have been said at an earlier date for applying the *ex post facto* Clause, it has been the unbroken rule of this Court that it has no application to deportation.

The fact that Congress has provided the special safeguard of an affidavit of good cause, and the Court has laid down the standard of clear, unequivocal, and convincing evidence, does not, as petitioner argues, imply that the proceeding has been recognized as criminal. The standard of "clear, unequivocal and convincing" evidence was taken from equity actions to annul a grant for fraud. See *United States* v. *Bell Telephone Co.*, 167 U. S. 224, 251. And equity proceedings were, in the old practice, sometimes required to be supported by affidavits. See Beach, *Modern Equity Practice* (1900) v. 1, Sec. 85, p. 110. The absolute right to refuse to be sworn, as distinguished from the right to refuse to answer incriminating questions,[3] has, however, historically always been limited to proceedings which are strictly criminal in character. Actions to cancel certificates of naturalization are not criminal actions, and the consequences of denaturalization are not imprisonment or forfeitures, but a reversion to the status prior to the fraudulent or

[3] Petitioner fails to note the vital distinction between total refusal to testify, and refusal to answer specific questions that may incriminate. Thus, he cites decisions for a "liberal application" of the privilege (Pet. 11–12) that relate only to the latter privilege and not to the total refusal to testify.

illegal conduct.[4] Indeed, citizenship has been revoked for reasons that involve no suggestion of criminality. *E. g., Laura* v. *United States*, 231 U. S. 9 (non-residence); *United States* v. *Ness*, 245 U. S. 319 (lack of certificate of arrival); *United States* v. *Ginsberg*, 243 U. S. 472 (place of naturalization hearing). It would therefore be anomalous to accord to defendants in denaturalization proceedings the absolute right not to testify that pertains strictly to criminal proceedings.

2. Petitioner's contention that the district court had no jurisdiction to punish him for contempt because the proceeding was originally instituted without a supporting affidavit is frivolous. The amended complaint, filed three years before he was called to testify, was accompanied by an affidavit. Petitioner himself stipulated that "the amended complaint is and shall be deemed to be substituted for the original complaint" (R. 55). Petitioner further stipulated that his prior motion to dismiss was to relate to the amended complaint. In short, the proceeding, by petitioner's own agreement, was based, not upon the former complaint, but upon the amended complaint substituted therefor, with its annexed affidavit.[5]

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[4] The fact that indirect, possibly disastrous consequences other than criminal prosecutions may ensue as a result of testimony has been repeatedly urged and as repeatedly rejected by this Court as a ground for invocation of the privilege against self-incrimination. *Ullman* v. *United States*, 350 U. S. 422, 430-431, and authorities there cited.

[5] For this reason the case does not present the question as to whether an affidavit filed later will validate the original complaint, as in *United States* v. *Lucchese* (C. A. 2), decided June 17, 1957 (Pet. App. C, 33-44), pending on petition for a writ of certiorari, No. 450, this Term.

3. Petitioner, in the courts below and here, has alternatively defended his refusal to be sworn on the ground that the affidavit of good cause annexed to the amended complaint was insufficient in that it was made by a person who did not have knowledge of the facts alleged, and did not sufficiently allege specific facts. That point goes to the merits of the Government's cause of action, and not to the court's jurisdiction strictly speaking. We do not believe that it is a proper defense to a refusal to be sworn in discovery proceedings under Rule 26. If that were so, any party who thought a ruling on a motion to dismiss a complaint was erroneous[6] could refuse to submit to discovery proceedings under Rule 26, and thus obtain a premature ruling on appeal of the validity of the interlocutory order refusing to dismiss the complaint. The validity of the complaint is a matter to be determined in the main proceeding, not indirectly on a motion for discovery. Cf. *United States* v. *United Mine Workers*, 330 U. S. 258.

For this reason, we do not believe that the instant petition for certiorari need await the ruling by this Court as to the sufficiency of an affidavit based on facts gleaned from government files, an issue presently before this Court in *Nowak* v. *United States*, No. 72, this Term, certiorari granted, 353 U. S. 922. If, however, the Court is of the view that the question is properly to be decided in the present posture of this

[6] Petitioner's motion to dismiss the complaint on this ground had previously been overruled. 115 F. Supp. 261. Reargument after the decision in *United States* v. *Zucca*, 351 U. S. 91, was denied (R. 77).

case, the Court may wish to withhold disposition of this petition pending the determination in *Nowak*.

CONCLUSION

The judgment below is a correct disposition of a particular factual problem upon established principles. It is respectfully submitted that the petition for certiorari should be denied.

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